(Permanent)

THE DEFENSE DEPARTMENT'S POLYGRAPH REGULATIONS OF 1982. STATEMENT BY PROFESSOR CHRISTOPHER H. PYLE BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, DECEMBER 9, 1982.

I appreciate this opportunity to comment on the regulations by which the Defense Department would radically expand its use of polygraphic interrogations.

I am here in my own capacity as a teacher of constitutional law and civil liberties who has spent more than a decade doing research and writing on rights to privacy. My interest in polygraphic investigations goes back even further to the late 1960s, when I was a captain in Army intelligence responsible for teaching counterintelligence agents how to respect constitutional rights.

In this statement I propose to take a critical look at the proposed regulations and the procedures they would inflict on government employees. I will look at the purposes behind these regulations, the extent to which they would cut back on the rights granted by the current regulation, the style of management they reveal, the impact this program would have on individual privacy and dignity, the unreliability of polygraphy itself, and the counterproductive effect that the proposed interrogations would have on the conduct of government. Finally, I will offer a few suggestions on what the Congress (and the Administration) might do to protect government employees and others from this form of scientology.

I would like to add that while I only speak for myself, I have discussed my statement with representatives of the American Civil Liberties Union and they are in general agreement with it.

Purpose Behind the Regulations

The Defense Department has asserted two purposes for this change in the polygraph regulations. The first is to enhance security by stemming leaks; the second is to enhance security by screening persons for sensitive positions.

However, these are not the Administration's only purposes. The manner in which it has used polygraph examinations during the past year suggests that this Administration is less interested in national security than it is in political security. Polygraphers were first employed last January when word leaked out of a high level meeting that the Administration's military build-up would cost $750 billion--or 50 percent more--than previously announced. National security was not jeopardized by this leak, but the Administration's credibility clearly was, as Mr. Frank Carlucci, the Deputy Secretary of Defense knew when he pleaded with participants at the meeting not to leak this embarrassing information to the press.

A second leak investigation was launched in February when the Washington Post revealed that Secretary of State Alexander Haig had described several world leaders in rather unfavorable terms. Again, the revelations were embarrassing, but not likely to do any harm which could not be repaired.

On the other hand, the Administration seems not to have launched investigations of two much more serious leaks. The first involved disclosure that the President had ordered covert operations against Nicaragua. The second involved information about the electronic intercepts which led President Reagan to believe that the Libyans were out to assassinate him.[1]

---

[1] Jay Peterzell, "The Government Shuts Up," Columbia Journalism Review, July/August 1982, 31-37.

The first two leaks were investigated, the second two were not. Why? The answer seems obvious. The first two were politically embarrassing; the second two were politically advantageous.

Jody Powell, President Carter's press secretary, explained the difference well:[2]

> All administrations pass along to selected reporters information designed to reflect favorably on the administration. White House staffers do it, assistants to the deputy assistant for you-know-what do it, and even presidents do it. Presidents do not consider these exercises to be leaks. When presidents talk about leaks . . . they mean telling a reporter something that creates problems or embarrassment for them or their administration.

Lyn Nofzinger, President Reagan's political strategist, made a similar admission when he quipped: "I want to leak my leaks, not your leaks."[3]

This is not to say that some of the proponents of aggressive polygraphy are not deeply concerned with protecting legitimate state secrets. Obviously the interdepartmental subcommittee which urged this new policy wants greater power to safeguard classified information and to lower the cost of screening government employees who will have access to such information.[4] But security officials always want greater powers of investigation. They would not get these powers, however, unless the Administration has an agenda of its own to superimpose on their eagerness.

That agenda is obvious. This Administration, like most administrations, is determined to dry up or otherwise manipulate and control, information that would enable members of Congress, the press, and the public to understand what it is doing and why.[5] These new polygraph interrogations are part of a much larger policy involving efforts to classify more information, to restrict

---

[2] Washington Post, Feb. 7, 1982, B 7.

[3] New York Times, Jan. 26, 1982, A 15

[4] New York Times, Oct. 9, 1981, A 23.

[5] See, for example, the Washington Post, June 6, 1981, A 8, the New York Times, Jan. 13, 1982, B 22, and Peterson, "The ... a Journalism Review.

access to classified information, to restrict official contacts with the press, and to repeal the Freedom of Information Act.

Stripping People of Rights

I regret having to say it, but a meanness of spirit pervades these regulations. The meanness is revealed instantly when the proposed regulations are compared to the regulations currently in force, regulations adopted in 1975 under the Ford Administration (DoD Directive 5210.48).

Warning of Legal Rights. The first, and most dramatic cutbacks appear in the warning of legal rights. The right to timely notice of the time and place of the interrogation, which prevents investigators from scheduling a polygraph examination hard on the heels of an exhausting grilling, is gone. So too is the right to consult counsel of one's own choice prior to the polygraph examination. (There is still no right to have counsel present at the interrogation).

Under current regulations, the subject must be warned that no adverse action may be taken against him if he refuses to take a polygraph examination. That warning is gone from the proposed regulations. Instead, adverse action on the basis of refusal alone is expressly permitted.[6]

Scope of the Interrogation. The proposed regulation (DoD Directive 5210.48R) also permits a much more intrusive interrogation. Now questions may be asked about conduct which has no security implications, even though the ostensible purpose of these interrogations is to protect security.[7] In two

---

[6] Compare III, B, 6 of the current regulation to Ch. 1, B, 6 of the proposed DoD Directive 5210.48R.

[7] Compare III, B, 4 of the current regulation to Ch. 3, A, 3 of the proposed directive.

respects the proposed regulation is more protective than the current one. Inquiries into racial affiliations and "disaffection" are now expressly forbidden.

However, "sedition" may still be investigated,[8] even though the Supreme Court has effectively declared sedition laws to be unconstitutional.[9] "Subversion" has also been retained as an investigative category, despite its long abuse as justification for inquiries into (and the covert suppression of) unpopular but lawful political activity. Another notorious buzz-word of highly politicized content--"terrorism"--has also been added to the list with no effort to distinguish between scary talk protected by the First Amendment and criminal talk calculated to move persons to criminal actions. Thus the proposed regulation has the capacity to inhibit and to promote the abuse of constitutionally protected speech and association.

Voluntarism and the adverse consequences of refusal. The entire theory of polygraphy--to the extent that it has any theory--rests on the concept of voluntariness. If the subject has been forced to take the examination his resentment will invalidate the results. The current regulation is consistent with this theory. It provides that polygraph examinations may be administered only to persons who volunteer to take them and further states that "adverse action shall not be taken against a person for refusal to take a polygraph examination."[10]

---

[8] Ch. 2 (Counterintelligence investigations).

[9] New York Times v. Sullivan, 376 U.S. 254 (1964), Brandenburg v. Ohio, 395 U.S. 444 (1967).

[10] III, B, 6, d.

The proposed regulation pays lip service to the principle of voluntarism: but allows adverse action to be taken against persons who refuse to submit. "[R]efusal to take such an examination may . . . result in:

a. Nonselection for assignment or employment.

b. Denial of authorization for access to classified information.

c. Withdrawal of authorization for access to classified information.

d. Denial of clearance for access to classified information.

e. Revocation of clearance for access to classified information.

f. Reassignment to a nonsensitive position."[11]

Since clearability is a precondition of officer rank, any officer who exercises his right to refuse a polygraph examination must in effect commit professional suicide. In short, there is nothing voluntary about the new examinations at all. This regulation is a cruel "Catch 22."

Data privacy. Under the current regulation, "Information concerning a person's refusal to submit to a polygraph examination shall not be recorded in his or her personnel file and shall be protected against unauthorized disclosure."[12] Nothing in the new regulation forbids dissemination of this fact. Under Enclosure 1 of the current regulation (entitled "Polygraph Criteria, Procedures, and Administration,") a clear and careful distinction was drawn between the interrogator's reports, (his notes and charts), and results (the synopses he prepared for the requesting authorities). Under the current regulation, the examiner's reports were to be destroyed within three months. Under the new regulation, no such destruction is required. All

---

[11] Unnumbered DoD Directive, Subject: DoD Polygraph Program, Section D (Policy), 5.

[12] III, B, 6, d, 1.

the notes and charts can be retained in perpetuity. Only non-record copies of the results (synopses) need to be destroyed.[13] Record copies presumably can be kept forever. Thus, even if the subject is cleared of all wrongdoing, every embarrassing admission will stay in the Department's files as a potential weapon in some future vendetta.

Management by intimidation. To draft these proposed regulations, someone has gone through the current regulation very carefully and has ripped out many of its safeguards of individual privacy, dignity, and due process of law. Their intent is clear: they intend to manage the Defense Department by intimidation. That is why hundreds of Pentagon employees have recently been asked to sign polygraph waiver forms in advance of any occasion that might justify their use.[14]

This administration is not the first to use polygraphs as a means of intimidation. Vice President Lyndon Johnson used polygraphs to intimidate the staff of the President's Committee on Equal Employment Opportunity. President Nixon considered using polygraphs to interrogate as many as 1,500 government employees in an effort to stem leaks. He told his aides, "Listen, I don't know anything about polygraphs and I don't know how accurate they are, but I know they'll scare hell out of people."[15]

Like Richard Nixon, the proponents of these regulations want to scare people. But the investigative means they have chosen are far more intrusive than those we commonly associate with President Nixon. Nixon's "plumbers" wiretapped a few reporters and critics and burglarized a few offices. CIA

---

[13] Ch 3, B (Records Administration).

[14] Washington Post, Nov. 18, 1982, A 4.

[15] House Report, No. 94-795, Committee on Government Operations, 94th Cong., 2d Sess. (1976), at 38.

agents even polygraphed a few State Department employees.[16] Carlucci's plumbers would threaten thousands of federal employees (and even some private contractors) with humiliating inquisitions. Nixon's plumbers breached people's privacy but usually left their dignity intact. Carlucci's plumbers would assault both privacy and dignity.

The Need for Strict Scrutiny

Because the proposed interrogations threaten fundamental constitutional rights, the ends which the government seeks to serve and the means by which it proposes to serve them must be subjected to the strictest of scrutiny. Strict scrutiny must also be applied to the means-end "fit," and consideration given to the availability of less drastic means and to the harmful side effects which the program may present. This duty rests with both Congress and the executive branch and need not await judicial review.

Ostensibly, this program is intended to stem leaks and to screen employees for honesty and reliability. Thus it must be asked whether the leaks which the proponents seek to stem are so damaging to the public interest that the fundamental rights of individuals ought to be violated. If, as I believe, the fundamental objective of this program is to enable the Administration to manipulate public information more effectively, then the end is not legitimate, let alone compelling. If the purpose is to combat the recruitment efforts of the KGB, the end would be legitimate, but not necessarily compelling, particularly if the need for security against foreign spies is weighed against the need for an informed Congress and citizenry. Moreover,

---

[16] New York Times, Jan. 20, 1982

if the Administration's motive--to manage by intimidation--is taken into account, then the ends it seeks are indefensible.

Nor is management by intimidation an appropriate means to the accomplishment of a legitimate governmental objective. Promotion of liberty, privacy, integrity, and dignity is one of the primary ends of our government. To violate these ultimate ends, either to achieve temporary political advantage or even to win some advantages in the covert wars of international espionage, is not rational. That would be the equivalent of burning a village in order to save it.

Nor, for reasons I will develop, is the particular means chosen--the use of polygraphic interrogations--a sufficiently reliable means either to stem leaks or to screen persons for positions involving access to classified information.

But even if the end is legitimate and compelling, and the means closely fitted to the achievement of that end, the means may so drastically invade fundamental rights as to render the entire effort unconstitutional and unwise. There are less drastic, and less potentially unjust methods of investigating leaks and, even if those means are not as "effective" as polygraphic interrogations, justice and due process of law require their adoption.

Finally, strict scrutiny requires that otherwise legitimate, important, and practical measures be rejected if to adopt them would cause systematic injustice to innocent persons or undermine severely the efficiency and morale of our government. This, I intend to argue, is precisely what the proposed interrogations would do.

Privacy and Dignity

The vast majority of Americans believe that they have a fundamental moral right to exercise substantial control over what others know about them. This moral right is integral to our social compact theory of government, to the idea of liberty as freedom from an overbearing government, and to the idea of due process of law. We have not adopted a statist theory of governance because, in our system of values individuals come first.

The moral right, which most people consider essential to their personal dignity as well as to their political freedom and economic and social well-being, is now generally referred to as a right of privacy. It is not an absolute right, of course, but it is a fundamental right. It is a right which comes first. To modify, limit, or narrow this claim, government officials must demonstrate a truly compelling societal interest. But even a compelling interest is not enough to overcome this most basic right if there is not a close "fit" between the means chosen and the end sought. The means must be the least drastic means available to serve the designated end, and the end itself must be legitimate. This means that the means themselves must be highly reliable and may not employ systematic injustice to achieve even a legitimate end, except, perhaps, if the nation has become a battlefield and the military is in charge.

Central to this fundamental right to substantial control over what others know about oneself is a right to hide portions of one's past, to hide some embarrassments and failures and, yes, even to lie a little about one's accomplishments, failures, and disappointments. Expressed this way, the right may seem shocking, because we also believe in honesty. However, we

recognize that a little dishonesty--perhaps reticence is a better word--may be the only protection any of us can have against misunderstandings, prejudice, and injustice in a society in which no one has a perfect record.

Anyone who thinks that polygraphers conduct their inquiries with precision is naive. A polygrapher does not come to a conclusion about a person's honesty on the basis of a few well-targeted questions; he conducts a general fishing expedition calculated to find embarrassing information locked in his suspect's mind--and all polygraph examinees are suspects. The polygrapher needs to uncover embarrassing matters in order to establish control responses against which to measure emotional reactions to the questions which are the central focus of his inquiry--if, in fact, his inquiry has a focus. Moreover, the polygrapher is paid to find embarrassing information. The people who hire polygraphers tend to suspect the worst and are not likely to accept findings that do not contain some derogatory information.

Before you accept assurances from polygraphers or the officials they serve, imagine yourself in the position of a Defense Department employee who is "asked" to submit to a polygraphic interrogation. You have not been given notice of the charges against you--or at least not with the specificity that due process in a judicial proceeding would require. Indeed, there may not be any charges. The interrogation may just be a periodic fishing expedition to see what the Soviets might get and use to blackmail you into becoming one of their spies. Nor can you distinguish between the "control" questions and the substantive questions: the questions that might remain in the interrogator's notes and the questions which will produce information for his report to your superiors. Indeed, having read Mr. Carlucci's regulations,

you know that answers to both sets of questions can be passed on to your superiors. Finally, as you sit there wired to the machine, you are no longer thinking like a person with moral courage. You are wondering if you can control your emotions so as not to cause the needles on the machine to leap off the chart, thereby baring your most innermost feelings in an ambiguous manner to an interrogator who does not know you but who is in a profession that tends to think the worst of people.

Now that you are in this frame of mind, think of how you might respond to the following questions:

--Have you ever been suspected of dishonesty?

--Have you ever failed a professional examination?

--Have you ever taken anything that did not belong to you?

--Have you ever been arrested?

--Have you ever sought psychological counselling?

--Have you used tranquillizers, amphetamines, barbituates, marijuana, or cocaine?

--Have you ever had an extramarital affair?

--Are you having one now?

--Have you ever employed the services of a prostitute?

--Have you ever disclosed any information learned in this office to any person not authorized to know that information?

--Can we count on you never to disclose anything that might be embarrassing to this office?

Remember, each of these questions can lead to other questions, and none is forbidden by the proposed regulation. The results can go to your superiors; they can be disseminated widely throughout the Defense Department and they may themselves become the subject of office gossip. The results may also be

retained in perpetuity.

If you had been asked to answer these questions, would you still think that polygraph interrogations are benign? Is it inconceivable that officials of a government that once ordered a burglary in order to obtain a psychiatrist's notes on Daniel Ellsberg would not dip into your polygraph file if they wanted to "get" you? Who is more likely to want to "get" you: any official whose policies you do not support, or the KGB? Whom do you fear most?

Finally, assume that you have submitted to the examination and revealed some details of your personal life that you have always kept to yourself. How would you be likely to feel? Would your sense of dignity be intact, or would you be angry at yourself for submitting to the examination, angry at your superiors for putting you in the position where you had no real choice, and embarrassed to discover that you are vulnerable to both humiliation and reprisal? Is it any wonder that many victims of polygraph interrogations feel that they have been subjected to a sort of strip-search?

Could it be that when the Supreme Court spoke of "reasonable expectations of privacy" this was one of the situations it had in mind? Is it reasonable to expect that the government will make humiliation and exposure to reprisals a condition of employment? Or is there a constitutional right against such treatment?

Proponents of polygraph examinations by government interrogators argue that there is no such right, or if there is, that it is waived because all polygraph examinations are voluntary--in the sense that no one is physically seized and strapped into the chair. There is no such right, they claim, because all of the usual guarantees which civil libertarians cite: First

Amendment privacy of beliefs and associations, Fourth Amendment guarantees against general searches and searches without warrants, the Fifth Amendment privilege against self-incrimination, the Fifth Amendment guarantee of due process, the due process presumption of innocent until proven guilty, the Sixth Amendment rights to counsel and to confront the witnesses, are only binding in other forums. But just because procedural due process began in response to overbearing courtroom interrogations is no reason to confine it there, as the Supreme Court has ruled on numerous occasions involving overbearing investigations by both Congress and the executive branch.

The Supreme Court has never directly ruled on the constitutionality of involuntary polygraph interrogations. However, in Schmerber v. California, 384 U.S. 757 (1966), the Court warned that "To compel a person to determine his guilt or innocence on the basis of physiological responses, whether verified or not, is to invoke the spirit and history of the Fifth Amendment." Id. at 761. Recalling its discussion in Miranda of the "complex of values" protected by that Amendment's privilege, the Court in Schmerber declared that "All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens [and to] the inviolability of the human personality . . . ." Id. at 761.

Unreliability

There are two excellent reasons why an honorable and innocent person should refuse to submit to a polygraphic interrogation. The first is to protect his privacy and dignity; the second is to protect himself from the

danger of being falsely accused. After reviewing the literature on polygraphic interrogations, I do not understand why any intelligent person would ever submit to one.

Polygraphers claim that their methodology is more than 90 percent reliable. But what does it mean to say that this method of interrogation is "reliable?"

Theoretical coherence. The first, and most demanding test of reliability would be to ask polygraphers to present a coherent and scientifically testable theory that explains their alleged "success." So far as I have been able to determine, there is no scientifically respectable body of opinion which supports the assumptions of polygraphy. The literature which supports the practice is to be found largely in non-scientific journals of police science. Criticism is generally to be found in professional and academic journals of high repute--journals that have the scientific claims of their authors checked by several qualified referees prior to publication.

The most distinguished scholars to study the technique have come out in opposition to it. For example, David T. Lykken, Professor of Psychiatry and Psychology at the University of Minnesota, has observed that the principle on which the so-called lie detectors are supposed to operate is "so implausible that very few psychologists would expect [it] to work with high accuracy.[17] Jerome H. Skolnick, another distinguished scholar, has been equally critical: "The scientific basis for lie detection is questionable. There seems to be little evidence that upholds the claim of a regular relationship between lying

---

[17] Washington Post, Nov. 16, 1977, A 28.

and emotion; there is even less to support the conclusion that precise inferences can be drawn from the relationship between emotional change and physiological response."[18]

Of course, a procedure need not be explicable in theory in order to be reliable in practice. Aspirin is the obvious case in point. However, to prove polygraphy scientifically reliable, there should be substantial evidence that the procedure is valid, verifiable, and replicable, that it cannot easily be beaten, and that it does not result in false accusations.

Validity. When polygraphers claim that their procedure is better than 90 percent reliable, they generally mean that in more than 90 percent of the examinations the interrogator found evidence that the subject was (or was not) deceptive. But how do they know? It is easy to finger 100 percent of the liars in any group. All one has to do is accuse them all and, a fortiori, all the liars have been caught. That can be done without a polygraph. To validate an accusation of deception, the polygrapher must be able to prove by independent evidence that the subject was lying. Obviously, few polygraphers have the resources or the motivation to develop corroborating evidence. The best they can count on is a confession, and even confessions are not always reliable. When a polygrapher says that he has been 90 percent accurate in his findings, what he really means is that he feels confident of his estimates in 90 percent of his cases. There is nothing scientific about such a feeling.

Polygraphers admit that they cannot detect deception if the subject is unresponsive, or if he has no fear of detection because of a fatalistic temperament, skill at rationalization, circumscribed amnesia, auto hypnosis, shock, or exhaustion. Nor are they confident of their ability to detect

---

[18] "Scientific Theory and Scientific Evidence: An Analysis of Lie Detection," 70 Yale

deception in pathological liars, the mentally dull, childlike personalities, or persons who for whatever reason do not distinguish in their own minds between truth and falsehood.[19] That polygraphers should admit these limitations on their art is commendable, but disturbing too, because it is not clear how they avoid interrogating such people. And if such people are as well represented among the subjects of polygraph interrogations as they are within the adult population, there is ever reason to doubt the industry-generated statistics alleging high accuracy of some sort.

Verifiability. If polygraphy is really a science, different examiners ought to arrive at the same conclusions from the same squiggles on a graph with a high degree of consistency. I have been unable to find convincing scientific evidence that this is the case. What I have been able to ascertain is that polygraphy, like adjudication of motive, is a subjective business and that polygraphers can and do differ on the significance of the same physiological evidence.[20]

Replicability. If polygraphy is a science, the same or different interrogators should get the same results from a second or third interrogation with the same person. However, I can find no credible evidence in the literature which indicates that polygraphers can replicate their findings with a high degree of consistency. They do not even employ standard scoring techniques. Some make highly subjective judgments based on answers, demeanor,

---

19 Highleyman, "The Deceptive Certainty of the 'Lie Detector,'" 10 Hastings L. J. 47, 58-59 (1958). See also Abbell, "Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials," 15 Am. Crim. L. Rev. 29, 33-41 (1977), and Psychology Today, July 1978, 107.

20 Apparently, the best F. Horvath could get was a 77 percent agreement among the ten polygraphers who scored the same charts for him blindly. See testimony of Prof. Lykken in Polygraph Control and Civil Liberties Protection Act, Hearings before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. Se

and the squiggles on the graph. Others use a numerical scoring technique which may seem objective but can be quite arbitrary. Perhaps replication by successive interrogations is not widely tried because polygraphers know that the emotional state of subjects can change from interrogation to interrogation, and thereby invalidate previous findings. Polygraphers are paid for certainty; not for doubting their own conclusions.

Beating the machine. To be reliable, the polygraph itself must not be vulnerable to manipulation. However, in a recent issue of Science, a team of researchers at the Institute of Pennsylvania Hospital and the University of Pennsylvania reported that subjects who had swallowed 400 milligrams of the tranquiller meprobamate were able to deceive their polygraphers.[21] Nor did the polygraphers detect that the subjects had taken the drug. Obviously, if there is a reliable way in which deceptive persons can beat the polygraphers at their own game, this program is worthless.

False accusations. Indeed, it is worse than worthless, it is unjust. The crucial, hidden statistic regarding the reliability of polygraphic interrogations concerns the number of persons mistakenly accused of deception. The best scientific evidence of the frequency of mistaken accusations has been compiled by G. Barland who, after beginning his career as work-a-day polygrapher, decided to be scientific about it and enrolled in a Ph.D. program at the University of Michigan. His doctoral dissertation, extended under contract with the U.S. Law Enforcement Assistance Administration, demonstrated a high degree of accuracy in detecting known liars from a group of criminal suspects

---

[21] "Meprobamate Reduces Accuracy of Physiological Detection of Deception," Science, April 3, 1981, 71-73.

otherwise known to be lying. Unfortunately, his test also accused half of the suspects who were independently known to be telling the truth.[22] Knowing this, would any reasonable person entrust his honor and reputation to the speculations of a polygrapher? Should a government impose such examinations on its employees?

The stock response to this evidence, of course, is an assurance that other methods of investigation will also be employed. Unfortunately, motivation to conduct an independent investigation dissipates the moment an admission is obtained. The classic example of this is the case of 18-year old Peter A. Reilly of Connecticut who confessed to the brutal murder of his mother in the course of a polygraph interrogation. Reilly had undergone 25 hours of incommunicado grilling, "But primarily Peter Reilly confessed . . . because the polygraph machine . . . 'said' that he [was guilty]. By the afternoon of his second day in custody, . . . Reilly was so willing to believe he had done what the polygraph charts indicated, that when the police pressed him for details on how exactly he had committed certain aspects of the crime, he didn't know and pathetically asked his polygraph operator for hints . . . ." Reilly was convicted and spent three years in prison before an independent investigation by a journalist established his innocence.[23]

But we do not have to go to Connecticut to find evidence that polygraphic interrogations involve a substantial risk of false accusation. Earlier this year the Pentagon decided to fire manpower executive John C. F. Tillson after polygraphers alleged that he had "failed" three lie detector

---

[22] Testimony of David Lykken in Polygraph Control and Civil Liberties Protection Act, supra, Note 20, at 29.

[23] C.D.B. Bryan, "The Lie Detector Lied," review of Barthel, A Death in Canaan (1976), in the New York Times Book Review, Dec. 12, 1976, 6.

tests. Tillson denied that he had leaked the embarrassing budget estimate, but his superiors decided to dismiss him anyway. That decision was reversed after the reporter who had published the information submitted a sworn statement declaring that Tillson was not his source and the Armed Forces Journal threatened to disclose the identity of the true leaker if Tillson was cashiered.[24] The Pentagon gumshoes, relying on polygraphic interrogations, had gotten the wrong man. Unfortunately they were not chastened by the experience, and are now proposing to extend the risk of false accusation still further.

The limited reliability of polygraphs as "lie detectors." As a means of assessing the credibility of an accuser, polygraphs are helpful. A truly voluntary interrogation of an accused person may also lend credence to the sincerity of his denials and drive investigators to look elsewhere in their hunt for the truth. But as an instrument for proving that someone actually did something, as opposed to proving that he displays physiological indicia of emotion when questioned, the polygraphic interrogation proves nothing. The most it may logically do is enhance an investigator's curiosity.

Unfortunately, as the Tillson and Reilly cases demonstrate, that is not what the examinations do. Misuse of the polygraph results is inevitable so long as investigators (or their employers) seek easy judgments based upon highly subjective, but seemingly scientific, impressions.

Why the polygraph "works." Of course, despite their lack of scientifically demonstrated reliability, polygraphic interrogations do "work." They "work" for the same reason that torture works--because the person under

---

[24] Wall Street Journal, May 18, 1982, 1; Washington Post, May 20, 1982, All, Armed Forces Journal, June 1982, 8, 16.

interrogation decides that resistance is futile. Polygraphy enables an interrogator to persuade, manipulate, harass, or intimidate a subject into revealing highly private information that he would not willingly disclose in an ordinary interview. Fearing that his emotions will cause the needles to jump and thereby "incriminate" him, the subject will pour out his admissions in the hopes of producing a smooth graph. Thus, for most people polygraphic interrogations are a subtle form of intimidation.

I submit that the proponents of these regulations know this. Like Richard Nixon, they know there isn't anything very scientific about polygraphy; that it is little more than another form of psychological one-upmanship. And, so far as they are concerned, the machine does not really have to work, just so long as it scares hell out of people.

The Counterproductiveness of Polygraphy

Finally, management by polygraphy is counterproductive. As a means of stemming leaks it will cost far more in resentment than it will ever produce in discipline. As a means of screening employees it can force people to divulge information which they would not include on a resumé or divulge in an interview. But the very existence of such information will make it more difficult to hire, promote, and clear good people for positions of trust and responsibility. That is because most personnel officers and security clearance granters are not risk-takers, but risk-minimizers. They are reluctant to take chances on people with mixed records, even though a person with a mixed record may be more mature, more experienced, and perhaps

even more honest as a result of his experiences. This is particularly true in the intelligence business where the risk-minimizing demands of security officers make it exceedingly difficult to hire, promote, and clear people with imagination, worldliness, and a subtle mastery of foreign cultures and ideologies.

In short, a bureaucracy governed by investigation, interrogation, and intimidation will be a bureaucracy of nebbishes--people with clean records, no imagination, less experience, and no moral courage. That may be acceptable to the Communists, but it should not be acceptable to us.

Recommendations

I have several recommendations for the Subcommittee.

1. No more studies. Few issues have been probed more extensively than the question of what to do about polygraphic interrogations. Extensive hearings in both Houses of Congress over the past 18 years have virtually exhausted the subject.[25]

2. Legislate. All of the committees which have studied polygraphy have arrived at basically the same conclusion. The technique is intrusive, unjust, unreliable, and counter-productive. It should be banned, not only as an investigative and screening device within the federal government, but as an investigative and screening device within companies which engage in, or whose activities affect, interstate commerce.

There are numerous models for such legislation, the most recent being Senator Bayh's rewrite of Senator Ervin's bill.[26] Whichever bill provides the basis for a new drafting effort, certain principles should be kept in mind.

---

[25] See, for example, Use of Polygraphs by the Federal Government (Preliminary Study), Committee on Government Operations, U.S. House of Representatives, 88th Cong., 2d Sess. (1964), Use of Polygraphs as "Lie Detectors" by the Federal Government, Hearings before a Subcommittee of the Committee on Government Operations, U.S. House of Representatives, 88th Cong., 2d Sess. (1964-1965), parts 1-6., Privacy, Polygraphs, and Employment, A Study Prepared by the Staff of the Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, 93rd Cong., 2d Sess. (1974), The Use of Polygraphs and Similar Devices by Federal Agencies, Hearings before a Subcommittee of the Committee on Government Operations, U.S. House of Representatives, 93rd Cong., 2d Sess. (1974), The Use of Polygraphs and Similar Devices by Federal Agencies, 13th Report by the Committee on Government Operations, 94th Cong., 2d Sess. (1976), Surveillance Technology, 1976, A Staff Report of the Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, 94th Cong., 2d Sess. (1976), Polygraph Control and Civil Liberties Protection Act, Hearings before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, 95th Cong., 1st and 2d Sess. (1977, 1978).

[26] See Polygraph Control and Civil Liberties Protection Act, supra, note 20.

First, if the subcommittee concludes that polygraphic interrogations are intrusive, unjust, unreliable, and counter-productive, no federal agency should be exempted from the prohibition. If the strict scrutiny analysis I have outlined is the proper way to proceed, the substantial state interests of the intelligence and security agencies cannot justify the adoption of a discredited means.

Second, the prohibition can be framed in at least seven different ways. First, agencies and employers should be forbidden to ask anyone to submit to an examination using so-called truth verification equipment or drugs. Second, the manufacture and sale of truth verification equipment and drugs should be forbidden,[27] with very limited exceptions to be administered by the Food and Drug Administration. (Hearings might be held to specify those legitimate uses for which the FDA might issue licenses.)

Third, no express exception should be made in the legislation to cover instances in which a person volunteers to take a polygraph or similar sincerity verification test to substantiate an accusation or a denial. If a person wishes to seek such an examination, that should be his prerogative, but nothing in the legislation should even suggest that it might be legitimate for the government or any employer to "ask" any person to submit to such an interrogation.

Fourth, the bill should contain both criminal and civil penalties. The civil penalty provisions should specifically provide for both actual and

---

[27] This was a recommendation of the Federal Privacy Protection Study Commission. See testimony of David F. Linowes, the Commission's chairman, in Polygraph Control and Civil Liberties Protection Act, supra, note 20, at 262.

punative damages. Civil penalties are crucial because enforcement of criminal penalties is likely to be rare given the priorities of prosecutors, particularly when the government stands accused.

Fifth, appropriations bills should contain prohibitions on the expenditure of funds for polygraph operators or for truth testing equipment or drugs in all circumstances not approved and licensed by the FDA.

Sixth, the rules of evidence in federal cases should be amended to underscore these policy judgments.

Finally, similar prohibitions should be incorporated into the Administrative Procedure Act and legislation defining the rights of Civil Service employees.

That completes my statement. I would be happy to assist the subcommittee in any way I can.